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No. 78-811

In the

Supreme Court of the United States

OCTOBER TERM, 1978

THE CITY OF EL PASO,

Petitioner,

v.

DARBYSHIRE STEEL COMPANY, INC.,
EL PASO MACHINE & STEEL WORKS, INC.,
and ROBBERSON STEEL, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Chief Justice and The Associate Justices of The Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 19, 1978, with rehearing and rehearing en banc denied August 18, 1978.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas, appearing in the Appendix hereto, *infra*, p. A-8,

is not reported in any official or unofficial reporter. The opinion of the United States Court of Appeals for the Fifth Circuit, appearing in the Appendix hereto, *infra*, p. A-3, is reported at 575 F.2d 521.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered and reported on June 19, 1978. A petition for rehearing and rehearing en banc was filed and was denied on August 18, 1978. Such notice of the denial of the motion for rehearing appears in the Appendix hereto, *infra*, p. A-23. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, under 15 U.S.C. §15b, a cause of action for price fixing under 15 U.S.C. §1 is barred by limitations when the executory contract obligating the plaintiff to pay illegal prices was signed more than four years prior to filing of suit, but the contract was performed, in part, by the defendants and the payments were made, in part, by the plaintiff, within four years of the filing of suit.

STATUTES INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act (15 U.S.C. §1(1973)) and Section 4(b) of the Clayton Act (15 U.S.C. §15(b) (1973)). Such statutes appear in the Appendix hereto, *infra*, pp. A-1, A-2.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In Court Below

On August 19, 1975, the City of El Paso (hereinafter called the "City") filed its Original Complaint, alleging two causes of action against the respondents (hereinafter called the "Conspirators"). First, the Original Complaint alleged that the Conspirators, together with their co-conspirator, Robert E. McKee Construction (hereinafter called "McKee"), had violated Section 1 of the Sherman Act by engaging in an unlawful combination and conspiracy in restraint of trade by fixing the prices of the structural steel used in the construction of the El Paso Civic Center Complex in El Paso, Texas (hereinafter called the "Civic Center Complex"). The City alleged damages of $500,000.00, trebled to $1,500,000.00. Second, the City alleged that the Conspirators had violated Texas Revised Civil Statutes Annotated, article 2368 (a) (Vernon), the competitive bidding statute for the State of Texas, by combining and conspiring to suppress competitive bidding on the fabricated structural steel to be used in the construction of the Civic Center Complex.

The City thereafter obtained leave of the District Court to file its First Amended Complaint, wherein the City alleged, in addition to those matters contained in its Original Complaint, that the Conspirators conspired to restrain commerce and trade by fixing the price of the reinforcing bar and miscellaneous metal used in the construction of the Civic Center Complex, and that the Conspirators had fraudulently concealed the illegal conspiracy from the City.

On September 19, 1977, the District Court granted the Conspirators' motion for summary judgment on the ground that the City's antitrust action was barred by the statute of limitations, entered judgment against the City on its antitrust price fixing claim and dismissed the pendant state claim without prejudice to the City's right to refile that claim in state court. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on June 19, 1978, and denied the City's motion for rehearing en banc on August 18, 1978.

B. Statement of Facts

On June 22, 1968, a bond issue was submitted to the voters of the City of El Paso seeking the electorate's approval of the issuance of bonds to construct the Civic Center Complex. This bond issue was approved by the voters, and, on July 31, 1968, the architectural firms of Garland and Hilles and Carroll, Daeuble, Du Sang & Rand (hereinafter called the "Civic Center Architects") were employed by the City to design a Civic Center Complex consisting of a theater, an exhibition hall and related structures. By the spring of 1970, the Civic Center Architects completed the plans and were ready to submit them to prospective bidders. The City duly advertised the project, solicited competitive bids as required by state law, and ultimately set May 8, 1970, as the date for submission of bids by prospective general contractors.

Three prospective general contractors requested copies of the plans: Hunt Building Corporation, C. H. Leavell & Company (hereinafter called "Leavell") and McKee. Hunt Building Corporation subsequently returned its plans, indicating that it did not desire to submit a bid.

Between the time that copies of the plans were received by the prospective general contractors and the bid opening date, McKee and Leavell, as potential general contractors, sought and received bids from prospective subcontractors for various portions of the work. Among the prospective bidders for the fabricated structural steel, miscellaneous metals and reinforcing bar to be used in the construction of the Civic Center Complex were the Conspirators, Darbyshire Steel Company, Inc. (hereinafter called "Darbyshire"), El Paso Machine and Steel Works, Inc. (hereinafter called "El Paso Machine") and Robberson Steel, Inc. (hereinafter called "Robberson"), all of whom requested copies of the plans from the Civic Center Architects.

Both in early April and about the first week in May, 1970, representatives from each of the Conspirators met at the offices of Darbyshire. In the course of those two meetings the Conspirators collectively agreed: (i) upon the work upon which each of them would bid; (ii) that they would not bid against each other for the material to be provided to McKee; (iii) that only one bid would be submitted to McKee under the name of Darbyshire only; (iv) that the bid would actually be a combination of the bids of the three Conspirators; (v) that each of them would earn a 15% profit on the material provided to McKee, and; (vi) that Darbyshire would earn an additional 5% on all the material provided to McKee by Robberson and El Paso Machine. The fact that the Conspirators would be submitting a joint bid was known by McKee almost at the outset.

On May 8, 1970, both Leavell and McKee submitted bids to the City for the construction of the Civic Center Complex. As a

part of these bid documents, Leavell and McKee each attached a list of proposed subcontractors reflecting that each of them intended to use Darbyshire as the subcontractor that would provide the fabricated structural steel and miscellaneous iron, reinforcing steel and other metal products to be used in the construction of the Civic Center Complex.

On August 10, 1970, a contract was signed between the City and McKee for the construction of the Civic Center Complex. On September 4, 1970, McKee signed an agreement with Darbyshire for the purchase of all fabricated structural steel and miscellaneous iron, steel and other metal products to be used in the construction of the Civic Center Complex. Additionally, on September 4, 1970, McKee signed a purchase agreement with El Paso Machine for the purchase of all reinforcing steel bar to be used in the construction of the project. The actual fabrication of the structural steel and miscellaneous metal for the Civic Center Complex was not performed by Darbyshire alone, but was also performed in part by El Paso Machine and Robberson.

Work started immediately on the construction of the Civic Center Complex and shipments of reinforcing bar commenced during the month of September, 1970. Structural steel was first shipped to the project site during the month of January, 1971, and the project was finally completed in the month of September, 1974. The provision of and erection of structural steel was completed during the month of May, 1974; the provision of miscellaneous metals for use in the project was also completed during the month of May, 1974; and the provision of reinforcing bar was completed during the month of July, 1974.

The last statement submitted to the City calling for the payment for steel was submitted in July, 1974. This action was filed by the City on August 19, 1975, approximately 12 months after the last payment had been made to the Conspirators and less than one year after the Civic Center Complex was completed.

ARGUMENT

The decisions of the Courts of Appeals are in conflict with regard to the time at which a cause of action grounded upon a continuing conspiracy first accrues and starts the running of the statute of limitations. The Seventh Circuit in *Baker v. F & F Investments,* 420 F.2d 1191 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970), and the Ninth Circuit in *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.,* 512 F.2d 1264 (9th Cir., 1975), have correctly followed this Court's ruling in *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968) (hereinafter referred to as *"Hanover Shoe")* to determine the two basic questions involved in this action: that is, (i) is the conspiracy a continuing conspiracy, such as monopolization, upon which a cause of action continues to accrue, or is the conspiracy one which is, like a refusal to deal, final upon the completion of a single act; and, (ii) if the conspiracy is of a continuing nature, must the action for treble damages be commenced within four years of the time damages become reasonably ascertainable or may an action for damages be maintained at any time during the active collection of the fruits of the illegal conduct of the defendants or within four years thereafter?

Relying upon this Court's holding in *Hanover Shoe,* the Seventh and Ninth Circuits have held that the collection of the

benefits of a contract which is either itself illegal or the product of an illegal conspiracy constitutes a continuing invasion of the plaintiff's rights and that a cause of action for damages continues to accrue with each collection of benefits. Those Courts have reached those decisions despite that the contracts were executed more than four years before filing of suit and despite that the damages attributable to the contract were also ascertainable more than four years before suit was filed. *Baker v. F & F Investments*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) (hereinafter referred to as *"Baker"); Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264 (9th Cir. 1975) (hereinafter referred to as *"Finley").*

The Fifth Circuit, in this action and in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975), ~~than four years before suit was filed. *Baker v. F & G Investments*~~, *Imperial Point Collonades, Inc. v. Mangurian*, 549 F.2d 1029 (5th Cir) *cert. denied* 985 S. Ct. 185 (1977) and *Spitz v. Buchwald*, 581 F.2d 1051 (5th Cir. 1977), has erroneously relied upon this Court's holding in *Zenith v. Hazeltine Research Institute*, 401 U.S. 321 (1971), to hold that an action brought upon a continuing conspiracy must be brought within four years of the date the damages are provable, that is, the date of the execution of the contract, despite the conspirators' collection of the benefit of the conspiracy within four years of the filing of suit.

Fortunately for the litigants in *Poster Exchange, Mangurian* and *Spitz*, the results achieved by the Fifth Circuit in *Mangurian, Poster Exchange*, and *Spitz* were consistent with this Court's holding in *Hanover Shoe* despite the Fifth Circuit's faulty reasoning. Herein, however, the Fifth Circuit's continued insistence upon

following the rationale of *Zenith* to determine the time at which a cause of action upon a continuing conspiracy accrues has resulted in a decision contrary to this Court's decision in *Hanover Shoe* and a decision inconsistent with the Seventh Circuit's decision in *Baker* and the Ninth Circuit's decision in *Finley.*

The Fifth Circuit's faulty reasoning first became apparent in its decision in *Poster Exchange.* Therein, the Fifth Circuit confused the concept of a continuing conspiracy with the concept of the inability of a plaintiff to prove damages to be suffered far in the future at the time his cause of action accrues. The following is illustrative of this confusion:

> [T]he statute of limitations problem is present with respect to (i) pre-1961 conduct (or non-action) not foreclosed by collateral estoppel and (ii) post-1961 conduct occurring more than four years prior to [the filing of this suit].
>
> Here *Zenith, supra,* cuts a big figure. First, whatever expressions we have used from time to time, which might suggest that in antitrust situations there is no such thing as a continuing conspiracy, now must yield their sweeping force. . . . More importantly, what is emphasized, perhaps for the first time, is that for acts which have long since taken place — and which are in no sense repeated in conjunction with new acts (or non-acts) — the act in effect is "revived" as a basis for later damages under a certain circumstance. That circumstance is the inability of the injured victim to earlier prove with requisite certainty the existence and amount of damages. In that circumstance it is a holding that in antitrust cases subsequent damages have not yet "accrued." They do not "accrue" until they can be reasonably established. The moment the victim can prove such subsequent damages, the statute begins to run leaving four more years in which to assert them. . . .

> With respect to post-1961 actions which substantively are not foreclosed by the 1963 summary judgment, Poster may recover damages for all such acts which occurred within four years of the [initiation of this suit]. As to such acts occurring prior to 1965, it can recover for such damages as could not reasonably have been proved prior to February 26, 1965.

Poster Exchange, 456 F.2d at 666-67.

In *Mangurian,* the Fifth Circuit appeared to be in agreement with the Seventh and Ninth Circuits' view of *Hanover Shoe* and *Zenith* and held that the collection of rentals under a recreational lease illegally tied to the sale of condominium units were "acts in furtherance of the alleged conspiracy behind it," *Mangurian,* 549 F.2d at 1043, and stated plainly that: "We therefore hold that so long as Mangurian continues to collect rent from these plaintiffs under the lease, plaintiffs' causes of action for the conspiracy continue to accrue." *Mangurian,* 549 F.2d at 1043-44.

Prior to the Fifth Circuit's ruling herein, there was no apparent difference in the results achieved in the Fifth, Seventh or Eighth Circuits. However, in this action, the Fifth Circuit retreated to its former faulty logic by holding that *Zenith* controls the question of the accrual of a cause of action based upon a continuing conspiracy. By doing so the Fifth Circuit has again ignored the effect of *Hanover Shoe* and has even limited the effect of *Mangurian* to conform that decision to the decisions in *Poster Exchange* and this case.

Herein, the Fifth Circuit distinguished the facts of this case from those in *Mangurian* by stating that damages were recoverable in *Mangurian* because the amount of rental to be charged in

Mangurian under the leases in question was not ascertainable at the time the leases were executed. The law in the Fifth Circuit is, as a result, that even when conspirators reap the benefit of the conspiracy within the limitation period by their overt acts, if the damages were provable at a time prior to four years before suit was filed, the action is forever barred. Such is not the law as enunciated in *Hanover Shoe,* nor is it the law of the Seventh and Ninth Circuits.

The Fifth Circuit's characterization of *Zenith* as a continuing conspiracy case seems to be the fatal flaw in the Fifth Circuit's logic, for in *Zenith,* the counterplaintiff, Zenith Radio, failed to prove the existence of any overt acts of the conspirators during the four years prior to the time the antitrust counterclaim was asserted. The holding of this Court in *Zenith* was not that Hazeltine Research Institute had engaged in a continuing conspiracy, but that despite Zenith's inability to show that the conspirators had committed acts during the limitations period and despite that the conspiratorial conduct may have been completed ten years before suit was filed, Zenith was nontheless entitled to recover those damages in 1963 which it could not have been reasonably expected to prove in 1954 because of the speculative and uncertain nature of the proof of profits lost in the remote future.

Therefore, it is obvious that the *Zenith* decision by this Court does not establish precedent for the concept of a continuing conspiracy; quite to the contrary, *Zenith* permits recovery of damages ***in the absence of a continuing conspiracy even when the overt action of the defendants occurred more than four years prior to filing suit.***

This Court faced the question of when a cause of action accrues upon a continuing conspiracy in *Hanover Shoe.* In *Hanover Shoe,* the defendant had, in 1912, commenced a lease only policy for its more sophisticated shoe manufacturing equipment. In a United States civil action, the lease only policy was found to be an illegal practice by which United Shoe Manufacturing Corporation had monopolized the shoe manufacturing equipment market. *United Shoe Machinery Corp. v. United States,* 347 U.S. 521 (1954). In 1955 Hanover Shoe, Inc., filed suit against United Shoe Machinery Corporation to recover three times the difference between the amount it had paid the defendant for the equipment and the amount it would have paid to buy the equipment during the limitations period. It was stipulated that the lease only policy had commenced in 1912, and that the then applicable Pennsylvania statute of limitations barred actions that had accrued prior to July 1, 1939.

Ironically, in its decision in *Mangurian,* the Fifth Circuit not only reached a result consistent with *Hanover Shoe* and the decisions of *Baker* and *Finley* in the Seventh and Ninth Circuits, it explained this Court's ruling in *Hanover Shoe* and compiled a summary of the case law applicable to the subject matter of this action upon which the Petitioner need not and cannot improve. A substantial portion of the *Mangurian* decision is therefore included herein below:

> [In *Hanover Shoe*] [i]n the district court the defendant argued that plaintiff was not entitled to recover any damages based on leases entered before July 1, 1939, because the cause of action as to those leases accrued when they were executed. The district court, relying primarily on *Cardinal Films, Inc. v. Republic Pictures Corp.,* 148 F. Supp. 156

(S.D.N.Y. 1957), *summarized* at note 21 *infra,* and rejecting *Muskin Shoe Co. v. United Shoe Machinery Corp.,* 167 F. Supp. 106 (D. Md., 1958), *discussed infra,* held, that plaintiff was entitled to recover damages for payments made to defendant after July 1, 1939 under leases entered before that date. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 245 F.Supp. 258, 294-97 (M.D. Pa. 1965).

In the court of appeals defendant changed its statute of limitations argument, asserting that plaintiff's whole cause of action accrued in 1912, when defendant first refused to sell its machinery. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 377 F.2d 776, 793-95 (3d Cir. 1967) (supplemental opinion). The court of appeals declined to follow cases cited by defendant, *see id.* at 794 n.2, that held the cause of action for a refusal to deal accrues upon the first such refusal, and not upon subsequent refusals. The court first noted that plaintiff sought to recover only those damages inflicted after 1939, and it adopted the district court's method of calculating these damages:

> "[T]he specific collection of rentals every month within the statutory period provides a concrete standard for the measurement of the damages which occurred here within the statutory period by comparing the rentals with the reasonable sales value of the machinery."

Id. at 794. The court then pointed to defendant's collection of rent within the limitations period on leases executed outside the period as an act, in addition to the refusals to deal, injurious to plaintiff, *Id.* (Emphasis added):

> "Finally, in the [cases relied on by defendant] the continuing conduct was that of a mere reassertion of the refusal to deal. Here, however, [defendant] went beyond a mere continuation of the refusal to sell; ***it collected rentals on leases*** and entered into new leases when old machinery was no longer in working condition and required replacement."

The defendant renewed its statute of limitations arguments in its appeal to the Supreme Court, where they received short shrift:

> "[Defendant] has also advanced the argument that because the earliest impact on [plaintiff] of [defendant's] lease only policy occurred in 1912, [plaintiff's] cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected [defendant's] argument in its supplemental opinion. We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Cf. *Emich Motors Corp. v. General Motors Corp.*, 229 F.2d 714 (CA 7th Cir. 1956), upon which [defendant] relies. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on [plaintiff]. Although [plaintiff] could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955."

392 U.S. at 502, n.15, 88 S. Ct. at 2236. These comments can be read, we think, as an endorsement of the district court's and the court of appeal's [sic] positions that the defendant's continued collection of rent within the limitation period on leases executed in the pre-limitations period marked the accrual of successive causes of action.

At any rate, this is how the Seventh and Ninth Circuits have read *Hanover Shoe.* In *Baker v. F & F Investment,* 420 F.2d 1191 (7th Cir.), *cert. denied,* 400 U.S. 821, 91 S.Ct. 42, 27 L.Ed. 2d 49 (1970), *aff'g Contract Buyers League v. F & F Investment,* 300 F.Supp. 210 (N.D. Ill. 1969), plaintiffs, the class of blacks who were buying homes from defendants on installment sales contracts, sued charging that defendants had conspired to exact more onerous contractual terms from plaintiffs than they exacted from white buyers.

Among other things, plaintiffs alleged this constituted a conspiracy to fix prices in violation of Section 1 of the Sherman Act. 300 F.Supp. at 216-17.

Defendants' motion to dismiss in the district court was on statute of limitations grounds quite similar to those asserted by defendants here:

> "Defendants . . . insist that there can be no relief with respect to any contract that was executed earlier than the limitations period, even if payments were made at a later time still within the applicable period, are still being made, or are required under the contracts to be made for many years to come."

Id. at 219. The district court denied the motion, holding that plaintiffs' cause of action did not stop accruing so long as defendants collected payments under the installment contracts and sought to enforce those contracts. *Id.* at 218-21. The Seventh Circuit, citing note 15 of *Hanover Shoe,* affirmed this holding and stated:

> "Plaintiffs have alleged wrongs committed by defendants which continue during the entire lives of the individual purchase contracts. They have alleged a conspiracy among defendants, the object of which was the establishment of a continuing relationship with individual plaintiffs. That relationship, by the same token, constituted a prolonged and continuing invasion of the rights of purchasers. . . . Because of the continuing nature of the overt acts alleged, the statutes of limitations do not commence to run when the contracts were executed but when they terminate." *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481, 502 n.15, 88 S.Ct. 2224, 20 L.Ed.2d 1231.

420 F.2d at 1200. Thus it is plain that, in the Seventh Circuit's opinion, a defendant's receipt of payments from a plaintiff under a contract that embodies illegally fixed prices, and its attempts to enforce the contract, constitute the

commission of acts injurious to the plaintiff; and that a new antitrust cause of action accrues from the commission of each such act. Significantly, we cited this portion of *Baker* with approval in *Poster Exchange* as an example of continuing conduct for which antitrust causes of action continue to accrue. 517 F.2d at 127.

In similar fashion, the Ninth Circuit relied on note 15 of *Hanover Shoe* in *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975), *rev'g and remanding on other grounds*, 365 F.Supp. 235 (N.D. Cal. 1972). In *Twin City* a predecessor of Finley, the owner of the Oakland athletics baseball team, entered a concession franchise contract in 1950 with the predecessor of Sportservice. The contract, which was amended in 1954 to provide for a 33 year term, called for the franchise to follow the team and for Sportservice's predecessor to extend credit to Finley's predecessor. In 1967 Finley moved the team to Oakland and in 1968 another concessionaire took over operations at the team's home park.

Sportservice sued Finley for breach of the 1950 contract. Finley counterclaimed, alleging among other things that the 1950 contract constituted a *per se* violation of Section 1 of the Sherman Act because it unlawfully tied the purchase of concession services to the extension of credit. Sportservice pleaded the statute of limitations, arguing "that Finley's suit is barred because it was not filed within four years of the last allegedly damaging act, the amendment or extension of the contract to its complete 33-year duration in 1954." 512 F.2d at 1270. The Ninth Circuit rejected the argument:

> "A civil cause of action under the Sherman Act arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time. . . . [Sportservice's] argument overlooks the necessarily continuing nature of the alleged harm. As the Supreme Court stated in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968),

> 'We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. [Citation omitted.] Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm. . .'"

512 F.2d at 1270. Thus the Ninth Circuit has read *Hanover Shoe* to mean that an antitrust cause of action continues to accrue so long as a defendant continues to accept benefits under or assert the validity of an allegedly unlawful tying contract.

A number of district courts also have concluded that a defendant's continued enforcement of or receipt of benefits under a contract with a plaintiff may be injurious acts for which new antitrust causes of action for tying, price-fixing, exculsive dealing, or conspiracy accrue. For instance, in *Lupia v. D'Oro Biscuit Co.*, [1974] Trade Reg. Rep. (CCH) ¶75,046 (N.D. Ill. 1972), *appeal dismissed* (7th Cir. 1973) (unreported), *cert. denied*, 417 U.S. 930, 94 S.Ct. 2639, 41 L.Ed.2d 232 (1974) plaintiff, a recently terminated franchisee of defendant, sued in 1972 for treble damages alleging that the distributorship contract between himself and defendant had contained exclusive dealing, territorial restriction, and price-fixing clauses unlawful under Sections 2(a) and 2(c) of the Robinson-Patman Act, Section 1 of the Sherman Act, and Section 3 of the Clayton Act. Defendant moved to dismiss, alleging that the statute of limitations barred the action because the distributorship contract complained of was executed in 1963, nine years before suit was commenced.

Plaintiff, in turn, argued that the injurious acts of the defendant had continued throughout the life of the contract (terminated in 1971), in that defendant had enforced and accepted benefits under the exclusive dealing and price-fixing provisions of the contract throughout that period. The district court, accepting plaintiff's argument, cited *Zenith*,

text and notes at notes 13-14 *supra*, for the proposition that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." [1974] Trade Reg. Rep. (CCH) ¶75,046, at 96,686. Then, relying on *Baker v. F & F Investment*, text and notes at notes 17-19 *supra*, and *Weber v. Consumers Digest, Inc.*, note 19 *supra*, the court stated that "in the context of a continuing contractual relationship between plaintiff and defendant analagous to the one we have here, the 'overt acts' continue for as long as the relationship continues." *Id.*

In *Schokbeton Products Corp. v. Exposaic Industries, Inc.*, 308 F.Supp. 1366 (N.D. Ga. 1969) Judge Henderson faced a similar problem. In May of 1964 plaintiff and defendant executed a contract by which plaintiff granted defendant a license to use his patented manufacturing process, in return for defendant's agreement to pay plaintiff certain royalties. In April of 1968 plaintiff exercised its contractual right to cancel the contract, and some time after an unsuccessful demand it sued defendant for royalties claimed to be due under the contract.

Defendant counterclaimed for treble damages, alleging that his contract with plaintiff had contained territorial restrictions and tying agreements unlawful under the antitrust laws. Plaintiff moved to dismiss the counterclaim on the ground that any cause of action plaintiff might possess accrued when the contract was executed, more than four years before suit was commenced. Judge Henderson, quoting note 15 of *Hanover Shoe*, held that defendant's efforts to enforce provisions of the contract within the limitation period were such acts as would cause new causes of action to accrue for plaintiff. 308 F.Supp. at 1367-69. He therefore denied plaintiff's motion to dismiss defendant's counterclaim. . . .

We find the reasoning underlying this line of cases persuasive. The cases are consistent with *Zenith* and *Poster Exchange*, in that accrual of a plaintiff's cause of action is based on injurious acts committed by the defendant within the limitations period. It also seems reasonable to us not to permit a defendant to argue that a suit to recover damages

caused by his recent acts is barred because a pre-limitations contract between himself and plaintiff, alleged to be unlawful in itself or the product of an unlawful conspiracy, purports to authorize the commission of such acts. Such defendants hardly are in a position to argue for the protection of the statute of limitations on the traditional ground that "evidence has been lost, memories have faded, and witnesses have disappeared." *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 544, 94 S.Ct. 756, 762, 38 L.Ed.2d 713 (1974), *Quoting Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49, 64 S.Ct. 582, 88 L.Ed. 788 (1944), when it is the defendants' own recent conduct that results in a finding of a newly accruing cause of action. *See Hanover Shoe, supra*, 392 U.S. at 502 n.15, 88 S.Ct. 2224.

The defendants in this case place primary reliance on *Muskin Shoe Co. v. United Shoe Machinery Corp.*, 167 F.Supp. 106 (D. Md. 1958); *Skouras Theaters Corp. v. Radio-Keith-Orpheum Corp.*, 193 F.Supp. 401 (S.D.N.Y. 1961), and *Steiner v. 20th Century Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956) to support the proposition that, in cases of the kind under discussion here, a plaintiff's only cause of action accrues when he executes the contract of which he complains, and not when defendants commit acts under the contract's authority. We do not find these cases compelling. In *Muskin Shoe* another plaintiff sued the same defendant as in *Hanover Shoe, supra*, alleging the same conduct. As in *Hanover Shoe*, defendant argued that plaintiff's causes of action accrued when plaintiff entered the leases in question, and not when plaintiff made payments under the leases. Although the district court accepted this argument in *Muskin Shoe*, 167 F.Supp. at 111-12, both the district court and the court of appeals in *Hanover Shoe* expressly refused to follow its holding. 245 F.Supp. at 295-96; 377 F.2d at 794 n.3. We therefore view the Supreme Court's affirmance on the statute of limitations question in *Hanover Shoe* as undermining the persuasiveness of *Muskin Shoe*.

Skouras Theatres held that the antitrust conspiracy cause of action of plaintiffs, who had entered allegedly unlawful pooling agreements with defendants, accrued when plaintiffs executed the pooling contracts, and not when defendants committed subsequent injurious acts pursuant to the agreements:

> "The injury was inflicted when the agreement was made and the consequent overt acts resulting from the agreement were merely damages which flowed from the original agreement."

193 F.Supp. at 406. As should be clear by now, however, we cannot accept the position that injurious acts committed against a plaintiff by a defendant are immunized from suit simply because an allegedly unlawful pre-limitations contract purports to authorize the commission of such acts. We therefore reject the holding of *Skouras Theatres.*

In *Steiner,* plaintiff leased her movie theater to one of the defendants in the pre-limitations period; the term of the lease extended into the limitations period. Plaintiff's allegation was that that defendant and other defendants had conspired to monopolize the first-run motion picture industry and that, in doing so, they had forced her to lease the theater on less favorable terms then she otherwise would have received. Plaintiff alleged that the execution of the lease was an overt act pursuant to the conspiracy injurious to her, and that defendants' closing of the theater within the limitations period also was. The Ninth Circuit held that plaintiff was barred from suing for damages resulting from the execution of the lease, but not from suing for damages resulting from closing of the theater. 232 F.2d at 194-95, 198. That court was not asked to decide, nor need we, whether defendant's payment of rental to plaintiff under the lease within the statutory period constituted acts that could be said to have damaged plaintiff. What we do know is that the Ninth Circuit would not view the fact that the leases were executed outside the statutory period as barring suit for injurious acts

committed under them within the period. *See Twin City Sportservice, supra.*

549 F.2d 1037-1042.

The Fifth Circuit distinguished this action from *Mangurian* on the ground that the payments upon the contract in question between the City and the defendants contained a price certain as opposed to the leases in *Mangurian* which provided for periodic adjustments in accordance with a formula based upon the consumer price index. That distinction was erroneous inasmuch as this Court in *Hanover Shoe* made no distinction between fixed and variable contractual payments and permitted the plaintiff to recover damages for payments made during the limitations period upon leases which were executed prior to the limitations period and which provided for a fixed monthly payment. Likewise, the Seventh Circuit in *Baker* permitted damages to be recovered for fixed payments made during the limitations period upon contracts executed prior to the limitations period. As well, no mention was made by the Ninth Circuit in *Finley* that the lease payments to Twin City Sportservice were variable so as to enable Finley to assert the antitrust counterclaim more than four years after the limitation of the lease.

In essence, in this action, the Fifth Circuit has seized upon a distinction which should not differ the result. The Fifth Circuit has ignored this Court's holding in *Hanover Shoe* and erroneously relied upon *Zenith* to conclude that even when the conspirators reap the benefit of the conspiracy by committing overt acts within the limitations period, the plaintiff is barred from suit if the contract providing for the collection of the fruit of the conspiracy

contains an unvariable price term and was executed outside the limitations period. The Fifth Circuit, by committing that error, reached a result contrary to this Court's decision in *Hanover Shoe,* and has juxtaposed itself against the Seventh and Ninth Circuits which have properly heeded the holding of *Hanover Shoe.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 16th day of November, 1978, a true and correct copy of the above and foregoing Petition for a Writ of Certiorari has been forwarded to Jack Ratliff, Esq., Ratliff & Haynes, 1904 State National Plaza, El Paso, Texas 79901, Attorney for Defendant, Robberson Steel, Inc., W. A. Thurmond, Esq., Scott, Hulse & Feuille, 11D El Paso National Bank Building, El Paso, Texas 79901, Attorney for Defendant, Darbyshire Steel Company, Inc., and W. C. Peticolas, Esq., Peticolas, Luscombe, Stephens & Windle, Attorney for Defendant, El Paso Machine & Steel Works, Inc.

_____

APPENDIX

15 U.S.C. §1 Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. §15b Limitation of actions

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

28 U.S.C. §1254 Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

THE CITY OF EL PASO,
Plaintiff-Appellant,

v.

DARBYSHIRE STEEL COMPANY, INC., El Paso Machine & Steel Works, Inc., and Robberson Steel, Inc.,
Defendants-Appellees.

No. 77-3233.

United States Court of Appeals, Fifth Circuit.

June 19, 1978.

Rehearing and Rehearing En Banc Denied Aug. 18, 1978.

City brought antitrust suit against steel fabricators arising out of their combined bid to supply structural steel and steel reinforcing bars for the construction of a civic center complex. The United States District Court for the Western District of Texas, William S. Sessions, J., granted the fabricators' motion for summary judgment on the ground that the claim was barred by limitations and city appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) where the rights and liabilities of the parties were finalized by the original contract, which specified the price, the quantity and the delivery schedule, thus rendering any damages caused by the alleged conspiracy provable with certainty, the theory of "continuing benefits" was not available to extend the limitations period, and (2) the evidence sustained the district court's determination that there was no fraudulent concealment of a conspiracy so as to toll the limitations period.

Affirmed.

1. Monopolies ⇔28(4)

In city's antitrust suit against steel fabricators arising out of their combined bid to supply structural steel and steel reinforcing bars

for construction of civic center complex, theory of "continuing benefits" was not available to extend limitations period where rights and liabilities of parties were finalized by original contract, which specified price, quantity and delivery schedule, thus rendering any damages caused by alleged conspiracy provable with certainty on that date. Sherman Anti-Trust Act, §1 et seq., 15 U.S.C.A. §1 et seq.; Clayton Act §§1 et seq., 4, 15 U.S.C.A. §§12 et seq., 16.

2. Monopolies ⇔28(4)

In city's antitrust suit against steel fabricators arising out of their combined bid to supply structural steel and steel reinforcing bars for construction of civic center complex, evidence sustained district court's determination that there was no fraudulent concealment of alleged conspiracy so as to toll statute of limitations. Sherman Anti-Trust Act, §1 et seq., 15 U.S.C.A. §1 et seq.; Clayton Act, §§1 et seq., 4, 15 U.S.C.A. §§12 et seq., 16.

Tom Diamond, Larry Baskind, El Paso, Tex., George R. Poehner, Bruce W. Claycombe, Dallas, Tex., John C. Ross, Jr., City Atty., David J. LaBrec, Asst. City Atty., El Paso, Tex., for plaintiff-appellant.

Richard Munzinger, El Paso, Tex., for Darbyshire Steel Co., Inc.

W. C. Peticolas, El Paso, Tex., for El Paso Machine & Steel Works, Inc.

Jack Ratliff, El Paso, Tex., for Robberson Steel, Inc.

Appeal from the United States District Court for the Western District of Texas.

Before COLEMAN, AINSWORTH and VANCE, Circuit Judges.

COLEMAN, Circuit Judge.

The City of El Paso appeals from the judgment of the District Court granting the defendants' motion for summary judgment on

the ground that the City's antitrust claim was barred by limitations. We affirm.

In the summer of 1968 El Paso voters approved a bond issue to provide funds for the construction of a Civic Center Complex. The City employed architects to design the Complex and represent the City during construction.

By the spring of 1970 the plans were ready for study by general contractors and subcontractors interested in bidding on the job. The defendants, all steel fabricators, submitted a joint bid to the general contractor for the structural steel and steel reinforcing bars for the Civic Center Complex. This combined bid was accepted by the general contractor.

On August 10, 1970, the City signed a contract with the general contractor for construction of the Civic Center. On September 4, 1970, the general contractor signed an agreement with Darbyshire Steel Company for the supply of all the steel and miscellaneous metal products to be used in the construction of the Civic Center Complex.

In May, 1970, the architectural firm handling the project learned that the defendants had worked out a joint effort, represented by the Darbyshire bid. A partner in the architectural firm contacted the *general contractor,* who gave assurances that the steel bids would be competitive. After all bids on the project had been submitted, the City engineers analyzed the steel bid and concluded that it was too high. Despite this analysis, and discussion between the City and its architects of the possibility of requiring rebidding of the job, the City continued negotiations with the general contractor leading to the August 10 contract.

The extent of the City's knowledge that the defendants had submitted a joint bid is disputed, but it is perfectly clear that the general contractor knew that the steel bid was the combined effort of the defendants and the City's architect knew of Robberson's participation in the bid by August, 1970. By letter dated August 24,

1970, Robberson informed the architect that it was "part of the joint venture for the structural steel with Darbyshire Steel, El Paso". Furthermore, by April, 1971, city inspectors had inspected steel for the project supplied by all three defendants.

El Paso delayed filing suit until August 19, 1975, alleging that the defendants conspired to submit a collusive bid on the structural steel required for the Civil Center, in violation of §1 of the Sherman Act. The City sought treble damages of $1,500,000. The District Court found that the City's cause of action accrued no later than September 4, 1970, the date the defendants contracted with the general contractor, and granted defendants motion for summary judgment on the grounds that the claim was barred by the four year statute of limitations, §4 of the Clayton Act.

El Paso contends that this was error because the defendants received benefits of the contract (payments for deliveries of steel) until 1974, well within the limitations period. In the alternative, the City argues that the statute was tolled by fraudulent concealment of the conspiracy by the defendants.

[1] The theory of continuing benefits, recently reiterated by this Court in *Imperial Point Colonnades Condominium v. Mangurian*, 5 Cir., 1977, 549 F.2d 1029 is inapposite. In *Mangurian*, relied on by appellant, the damage to the plaintiff was incapable of precise proof at the time the contract was signed because future payments under the contract (which also involved an illegal tying arrangement) were periodically adjusted with reference to the Department of Labor's consumer price index. Each collection by the defendants constituted a separate act injurious to the plaintiff and allowed a new cause of action to accrue. In the instant case, the rights and liabilities of the parties were finalized by the contract signed on September 4, 1970. On that date, the price, the quantity, and the delivery schedule were fixed by the terms of the contract. Any damages caused by the alleged conspiracy were provable with certainty on that date.

The Supreme Court has addressed this question of the antitrust statute of limitations:

> "[I]f a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action."

Zenith Radio Corporation v. Hazeltine Research, Inc., 401 U.S. 321, 339, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971) (citations omitted).

The Fifth Circuit relied on *Zenith* in holding that under a certain circumstance acts which took place prior to the period of limitations can be "revived" as a basis for later damages:

> "That circumstance is the inability of the injured victim to earlier prove with requisite certainty the existence and amount of damages. In that circumstance it is a holding that in antitrust cases subsequent damages have not yet 'accrued'. They do not 'accrue' until they can be reasonably established. The moment the victim can prove such subsequent damages, the statute begins to run leaving four more years in which to assert them."

Poster Exchange, Inc. v. National Screen Service Corporation, 5 Cir., 1972, 456 F.2d 662.

There was no difficulty about proof of damages on September 4, 1970. By expert testimony the value of the steel in a freely competitive market could have been established. The contract named the price of the steel in the allegedly restricted market created by the defendants' alleged conspiracy. The difference between the two could have been established with reasonable certainty. In the words of *Zenith*, the City of El Paso felt an "adverse impact" on Septem-

ber 4, damages were provable on that date; therefore, the City had four years from that date, until September 4, 1974, in which to file its antitrust action. No suit was filed until August 19, 1975, nearly a year late.

[2] Appellant's second contention that the statute of limitations was tolled by the defendants fraudulent concealment of the conspiracy is without merit. The evidence shows several occasions on which either the architect or the City itself was notified that Darbyshire was working in concert with the other defendants to provide the general contractor with the steel requirements of the Civic Center Complex. In fact, it appears to have been common knowledge among the parties to the construction project that the defendants were working together. Furthermore, no evidence whatsoever exists on the record that any of the defendants fraudulently concealed the joint nature of the bid. The statute of limitations was not tolled by fraudulent concealment. The City's cause of action expired four years from September 4, 1970.

AFFIRMED.

In the
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

THE CITY OF EL PASO,
Plaintiff,

v.

DARBYSHIRE STEEL COMPANY, INC.,
El Paso Machine & Steel Works, Inc., and
Robberson Steel, Inc.,
Defendants.

No. EP-75-CA-171

MEMORANDUM OPINION AND ORDER

Plaintiff, THE CITY OF EL PASO, has filed the instant suit against the three Defendants, DARBYSHIRE STEEL COMPANY, INC., EL PASO MACHINE & STEEL WORKS, INC., and ROBBERSON STEEL, INC., for alleged violations of the Sherman Anti-Trust Act, 15 USC S 1. Plaintiff alleges that the Defendants and their co-conspirator combined and conspired by way of a continuing agreement, understanding, and concert of action to suppress and eliminate competition in bidding, to fix the price to be paid by Plaintiff to Defendants for products supplied by Defendants, to allocate the fabrication of those products among the Defendants and to divide the profits therefrom. Plaintiff alleges damages of $500,000.00, trebled to $1,500,000.00.

I.

In 1968 the City of El Paso contracted with two architectural firms to draw plans and take bids for the construction of the El Paso Civic Center Complex. The plans, once finished, were sent to three different general contractors and to six prospective steel subcontractors, three of which are named Defendants herein. Two subcontractors and one general contractor subsequently withdrew during the bidding phase. By April of 1970, the three named Defendants had decided to submit a joint bid for the steel subcontract portion of the Civic Center Complex, which bid was submitted to the general contractor in the name of the Darbyshire Steel Company.

The general contract for the construction of the Civic Center Complex was awarded to the McKee Construction Company on August 10, 1970. Of the prospective steel subcontractors submitting bids to McKee, the joint bid of Darbyshire, Robberson, and El Paso Machine, Defendants herein, was the low bid. On September 4, 1970, McKee contracted with these Defendants for

the supply of the steel products to be used in the Civic Center project.

On August 19, 1975, the City of El Paso filed this suit alleging a violation of the Sherman Anti-Trust Act. The Defendants have moved for summary judgment, pursuant to Federal Rule of Civil Procedure 56(b), contending that the four-year statute of limitations applicable to such actions precludes the prosecution of this suit, since the steel subcontract was signed in 1970, and this suit was not filed until August of 1975. Plaintiff responds that the suit was filed timely, since a cause of action did not exist until all payments on the steel subcontract were completed in 1974, and, alternatively, even if a cause of action existed as early as 1970, the Defendants fraudulently concealed the cause of action, thereby tolling the statute of limitations until the Plaintiff had reason to know of the cause of action.

ACCRUAL OF A CAUSE OF ACTION

II.

The Sherman Anti-Trust Act provides that all suits must be brought within four years of the accrual of a cause of action. 15 USC S 15(b). The City contends that the cause of action did not accrue upon the signing of the contract, but that the Plaintiff's rights were continually invaded by an ongoing course of conduct which constituted a continuing violation. Specifically, Plaintiff claims that the Defendants' delivery of steel pursuant to the subcontract, the invoicing of the steel, and the acceptance of payments therefor at a price established by conspiratorial conduct were all acts in violation of the Anti-Trust laws. Plaintiff asserts that the statute of limitations is therefore extended four years beyond the termination of those acts. The final payment for delivery of steel was not made until some time in 1974. Thus,

argues Plaintiff, the cause of action was not barred before the date of filing this law suit, August 19, 1975.

Defendants contend that the cause of action accrued at the moment the Plaintiff could first file a lawsuit, and not as each item of damage was sustained. Under this theory, the latest possible date for filing this lawsuit would be September 4, 1974, four years after McKee contracted with the Defendants. Defendants contend that September 4, 1970, was the date the Plaintiff's economic interests were irrevocably affected, and that delivery of and payments for steel were mere continuations of the alleged conspiracy rather than overt acts individually causing damage to the Plaintiff.

The "ongoing conspiracy" concept, which revives a cause of action when acts are committed pursuant to a conspiracy, was first articulated in *Hanover Shoe v. United Shoe Machinery Corporation,* 392 U.S. 481 (1968). Plaintiff in that case alleged that certain shoe machinery manufacturers were conspiring to damage plaintiff's shoe manufacturing business by leasing, rather than selling, shoe manufacturing equipment. Plaintiff contended that refusals to sell machinery forced Plaintiff to pay prices for the use of the machinery in excess of what it would have paid had it been able to buy the machinery. The Supreme Court permitted maintenance of the cause of action even though a period of 43 years had elapsed from the time the defendant instituted its lease-only policy to the time of suit. The Court held that each refusal to sell, in response to Plaintiff's request to purchase, revived the cause of action.

The *Hanover* doctrine was further explicated in *Zenith Radio Corporation v. Hazeltine Research Corporation,* 401 U.S. 321 (1971). There, defendant, a holder of a patented radio and television circuit design, refused to grant patent licenses to those seeking to export products containing the circuit design. The

Supreme Court allowed the plaintiff to prosecute its suit long after the defendant's initial refusal to deal, reasoning that plaintiff, upon the initial refusal, had no way of determining the amount of damage in futuro caused by defendants' refusal to deal.

The *Hanover* and *Zenith* cases actually restrict the former rule, i.e., that a cause of action accrued when an act in furtherance of a conspiracy first caused damage to the plaintiff. The cases prior to *Hanover* and *Zenith* do not establish definite guidelines for determining what acts give rise to a cause of action subject to the four year statute of limitations. The general rule was that if damages were ascertainable and certain to occur at the time of an unlawful act by a defendant, and later conduct by the defendant was merely a continuation of the former course of conduct, then the original act gave rise to a cause of action, and the statute of limitations began to run.

III.

The United States Court of Appeals for the Fifth Circuit has discussed the impact of the *Hanover* and *Zenith* decisions. In *Poster Exchange v. National Screen Service Corporation,* 517 F.2d 117 (5th Cir. 1975), plaintiff filed suit in 1969, claiming that defendants had stopped supplying plaintiff with movie advertisement posters in 1961. The district court dismissed the case for failure to file suit within the four year statutory period, but the Court of Appeals remanded the case to the trial court in order to afford plaintiff an opportunity to demonstrate that "there had been a specific act or word of refusal during the limitations period." 517 F.2d at 129. The Court of Appeals set out two requisites of an act giving rise to a new cause of action. First, the act must be more than the necessary result of an earlier, unequivocal act. Second, an act must be more than the "abatable but unabated consequences of some pre-limitation action." 549 F.2d at 128.

The question which the Court must answer in the instant case is whether the Defendants' collection of payments for steel within the prescriptive period is an unabatable and necessary consequence of the Defendants' pre-limitations action, or a new overt act giving rise to a cause of action not barred by the statute of limitations. A similar issue was addressed in *Imperial Point Colonnades Condominium v. Mangurian,* 549 F.2d 1029 (5th Cir. 1977), where the Court held that the receipt of benefits pursuant to a contract entered between plaintiff and defendant before the limitations period was conduct giving rise to a new cause of action not barred by the statute of limitations. Drexel Properties, Inc., a defendant in *Mangurian,* owned a 552-unit condominium complex. Defendant Mangurian, the sole stockholder of Drexel, owned a tract of land adjacent to the condominium. The two defendants entered into an agreement whereby Drexel was to lease from Mangurian the adjacent tract as a recreational facility for the condominium for a period of 99 years. Drexel was to pay Mangurian a quarterly rent on the lease, the rental rate to be adjusted every three years with reference to the Department of Labor's Consumer Price Index. Plaintiffs in *Mangurian* bought condominium units from the defendant, Drexel Properties, Inc. The purchase agreement required that each unit purchaser, as a condition to ownership, accept assignment from Drexel of 1/552 undivided interest in the lease between Drexel and Mangurian.

More than four years after plaintiffs purchased their condominium units from Drexel, plaintiffs received from Drexel a notice that the lessor had elected to increase the rent on the recreational facilities and that plaintiffs' quarterly rent on said facilities would be raised. Plaintiffs alleged that the contractually-required assignment of a portion of the lease between Drexel and Mangurian constituted an unlawful tying agreement. The district court granted summary judgment for the defendant on the ground that plaintiffs' suit, filed more than four years after plaintiffs pur-

chased the condominium and joined the lease, was barred by the statute of limitations. *Imperial Point Colonnades Condominium, Inc. v. Mangurian,* 407 F.Supp. 870 (S.D.Fla. 1976).

After a thorough evaluation of the *Hanover, Zenith,* and *Poster* decisions, the Fifth Circuit Court of Appeals held that the defendants' continued acceptance of benefits under, and assertion of, the allegedly unlawful tying agreement constituted new causes of action, not barred by the statute of limitations. The collection of payments under the contract was an act in furtherance of the alleged conspiracy. 549 F.2d at 1043.

The nature of the contract and the obligations of the parties in *Mangurian* are vastly different from those in the instant case. *Mangurian* involved a contract establishing an ongoing, continuing, 99-year relationship allegedly violating the anti-trust laws. Defendants continued to accept and increase the benefits accruing because of that relationship. The purpose of the original contract in *Mangurian* was to establish the ongoing relationship violating the anti-trust laws. Plaintiffs in *Mangurian* suffered the consequences of defendant's wrongful actions until the filing of plaintiffs' suit, and would continue to suffer for a period of 99 years. The damages suffered by the plaintiffs in *Mangurian* were unascertainable at the time of the contract for purchase of the condominium unit, as plaintiffs were continually subject to rent increases.

In the instant case, on the other hand, Defendants allegedly conspired to engage in price-fixing arrangements culminating in a contract with the Plaintiff. The alleged purpose of the contract was to establish a price which the Defendants would later accept from the Plaintiff. The purpose was not to establish a continuing, ongoing relationship with the Plaintiff. The fact that the Defendants in the instant case continued a relationship with the Plaintiff is merely a necessary incident of the contract binding the parties.

The Civic Center Complex took several years to complete, and thus Defendants supplied steel and accepted payments therefor over the same period of time. The alleged purpose of the illegal agreement between the Defendants was to establish a price for steel. This purpose was accomplished once the contract had been signed; once that purpose was accomplished, the alleged injury to Plaintiff was necessarily established and ascertainable.

The purpose of the statute of limitations is to require that claims be presented to the Court while memories are fresh, evidence obtainable, and witnesses available. A deciding factor in the *Mangurian* decision was the defendant's recent conduct causing damage to the plaintiffs. In the instant case, the conduct which Plaintiff alleges constituted a violation of the anti-trust laws occurred before the signing of the contract between the Defendants and the Plaintiff. The purpose of the statute of limitations is not subverted by holding that Plaintiff's only possible cause of action accrued upon the signing of the contract with Defendants in 1970. The alleged wrongful conduct of Defendants in this case terminated prior to the signing of that contract. The alleged wrongful conduct in the *Mangurian* case continued as long as the defendant continued to take advantage of the tying arrangement by accepting rent, and further, by raising that rent.

The Court concludes, therefore, that Plaintiff's cause of action, if any, accrued no later than September 4, 1970, the date on which these defendants contracted to supply steel for the construction of the Civic Center Complex.

FRAUDULENT CONCEALMENT

Although a cause of action may have arisen no later than September of 1970, that cause of action is not necessarily barred if Defendants have fraudulently concealed facts which would support a cause of action or if conspiratorial conduct giving rise

to a cause of action is by its nature self-concealing. First, the Plaintiff asserts that the Defendants submitted their joint bid in the name of Darbyshire alone, as opposed to submitting three separate bids for the steel materials which each Defendant was to supply individually. Plaintiff contends that Defendants thereby concealed the fact that they had jointly negotiated the subcontract and thus eliminated competition. Second, Plaintiff asserts that Frank Cordero, a partner in the firm of the general contractor, McKee Construction Company, was a co-conspirator with Defendants. Plaintiff contends that Cordero sought to cover up the conspiracy in order to enhance McKee's chances of obtaining the general contract with the City. Third, Plaintiff asserts that, even if there were no acts of concealment by the Defendants or by Cordero, the conspiratorial nature of the Defendants' conduct was, by itself, such that it concealed the facts which would have given Plaintiff notice of the existence of a cause of action. Plaintiff, therefore, asserts three independent grounds upon which it argues that the existence of a cause of action has been concealed: (1) the alleged fraudulent concealment on the part of the three Defendants; (2) the alleged fraudulent concealment upon the part of Frank Cordero, a "co-conspirator" of the Defendants; and (3) the self-concealing nature of the Defendants' conduct in restraint of trade.

IV.

The doctrine of fraudulent concealment is applicable in anti-trust cases. *General Electric v. City of San Antonio,* 334 F.2d 480 (5th Cir. 1974). Furthermore, fraudulent concealment, in order to toll the statute of limitations, need not necessarily result from actions by the defendants, but may result from the inherently secret nature of the alleged conspiratorial conduct. *Crummer v. DuPont,* 255 F.2d 425 (5th Cir.), cert. denied, 358 U.S. 884 (1958).

In order to toll the statute of limitations because of concealment, a plaintiff must demonstrate that he was ignorant of the existence of a cause of action through no fault of his own. *City of Detroit v. Grinnel Corporation,* 495 F.2d 448 (2nd Cir. 1974). In *Grinnel,* the relationship between the defendants and affiliated companies was public and common knowledge for several years prior to the statute of limitations period. This knowledge placed upon the plaintiff the burden to inquire into the nature of the affiliation. Having made no inquiry, plaintiff could not claim that defendants had fraudulently concealed plaintiff's cause of action.

Mere ignorance of a cause of action is not sufficient to toll the statute of limitations, and the fact that another has engaged in fraudulent acts to conceal the existence of a cause of action does not, of itself, toll the statute of limitations. *Akron Presform v. McNeill,* 496 F.2d 230 (6th Cir. 1974). In order to raise the issue of fraudulent concealment, the plaintiff must allege that he is not at fault for failing to discover his cause of action by making "distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered and what the discovery was" so that the Court may clearly see whether the cause of action should have been discovered. *Weinberger v. Retail Credit Company,* 498 F.2d 552 (4th Cir. 1974). A failure to make such averments in response to a defendant's motion for summary judgment will render plaintiff's summary judgment proof inadequate to avoid summary judgment. If the defendant shows "any fact that should excite his (plaintiff's) suspicions," the defendant has sufficiently demonstrated plaintiff's "actual knowledge of the entire claim." *Dayco Corporation v. Goodyear Tire and Rubber Company,* 523 F.2d 389 (6th Cir. 1975).

Defendants seek to demonstrate three ways in which the Plaintiff was on notice of any possible anti-trust violation on the part of

the Defendants. First, Defendants assert that Bernard Mulville, the project architect for the Civic Center Complex, was acting as agent for the City when he received notice, on or about May 7, 1970, that the Defendants had agreed to combine and submit a joint bid to the general contractor. The affidavits, depositions and exhibits submitted by Plaintiff and Defendants herein do not conclusively establish that Bernard Mulville was, as a matter of law, an agent for the City for the purpose of determining the reasonableness or legality of a subcontract bid. The issue of the scope of authority, and therefore the issue of notice to the principal, the City, is a fact issue. The Court cannot conclude as a matter of law that Bernard Mulville was acting as agent for the City when he received notice of the possibility of collusive bidding.

Second, Defendants point out that Bernard Mulville testified in his deposition that he immediately notified George Dieter, the City's Director of Public Works, in charge of the Civic Center Complex, of Mulville's suspicion of collusive bids. Dieter's deposition testimony, on the other hand, is that he does not recall a conversation concerning any underhanded dealings by the Defendants, but that if such a conversation had in fact taken place, he would certainly have recalled the conversation. Dieter, on affidavit in support of Plaintiff's response to the Motion for Summary Judgment, declares that "I received no information suggesting any illegitimacy or unreasonableness respecting the bids submitted by the prospective suppliers of structural steel..." Therefore, the deposition, affidavit and exhibit evidence in support of the Motion for Summary Judgment do not establish as a matter of law that there is no fact issue with respect to whether George Dieter, as representative of the City, received notice of any fact which would inform him of the existence of a possible cause of action against these three Defendants on or about May 7, 1970.

Third, Defendants contend that even if Bernard Mulville was not an agent for the City for the purpose of determining the

reasonableness or legality of the bid, and even if Mulville did not convey to George Dieter a suspicion of rigged bids, events transpiring after May 7, 1970 and before August of 1971 were sufficient to put the Plaintiff on notice of facts which should have given rise to an inquiry by Plaintiff into the nature of the joint venture of these three Defendants.

V.

After the opening of the general contract bid on May 8, 1970, the steel subcontract bids were higher than the City anticipated. Negotiations began between George Dieter, Bernard Mulville, and representatives of the McKee Construction Co. During these negotiations, representatives of each of the three Defendants were in attendance. Plaintiff and McKee Construction Company both had knowledge that the three Defendants had combined to submit a joint bid for the steel subcontract.

On August 10, 1970, the City contracted with McKee Construction Co., as general contractor, for the Civic Center Complex. Thereafter, the City sought the return of its plans from the non-successful bidders. On August 24, 1970, Robberson Steel notified the Civic Center architects that Robberson had retained its set of plans and specifications, as Robberson was a participant in the joint venture with Darbyshire and El Paso Machine.

During the construction phase of the Civic Center project, the City hired Dickinson Laboratories to inspect the work being done by all of the subcontractors. In February of 1971, Rogelio Bombach, an employee of Dickinson Laboratories, received steel delivered from Defendant, El Paso Machine, and thereby discovered that more than one steel fabricator was supplying steel for the Civic Center Complex. Bombach delivered daily inspection reports to the City, the architects and McKee Construction Co. In April of 1971, Dickinson sent letters to the architects and to the

City, copies of which Mr. George Dieter has acknowledged he received, evidencing knowledge of the joint efforts of these three Defendants. These letters detailed the testing performed by Dickinson and informed the architect and the City that tests had been run at the business site of each of the three Defendants. The letters referred specifically to each of the Defendants. George Dickinson orally informed Mr. Charles Cantrell, the City employee responsible for coordination of the Civic Center project and reporting to George Dieter, of the need to inspect certain steel which had been shipped by Robberson from Oklahoma City. George Dieter first learned of the combined nature of the steel subcontract bid when arrangements were made with Dickinson for inspection of the steel in February of 1971.

Where a party moving for summary judgment demonstrates that the non-moving party is, as a matter of law, not entitled to any relief, the non-moving party, in order to defeat a summary judgment, must come forward with specific facts showing a genuine issue for trial. *A & M Stores, Inc. v. Hiram Walker, Inc.*, 427 F.2d 167 (5th Cir. 1970). Defendants here have demonstrated that, as a matter of law, the statute of limitations has run, unless tolled by fraudulent concealment. As discussed above, Plaintiff carries the burden of demonstrating facts which would show that the cause of action was concealed and that Plaintiff remained in ignorance of the existence of a cause of action, through no fault of its own.

Plaintiff has come forward with no allegations of specific facts showing that it made inquiry into the nature of the agreement between the Defendants. Although Defendants have shown that the price of the steel for the Civic Center Complex was higher than Plaintiff had anticipated and that Plaintiff knew that Defendants had entered into a joint agreement to supply the steel for the Civic Center project, Plaintiff never attempted to inquire into the

nature of the agreement among the Defendants, nor the reason for the inflated steel bid.

VI.

It appearing to the Court that Plaintiff has failed to raise an issue of fact with respect to fraudulent concealment of an alleged cause of action.

IT IS ORDERED that Defendants' Motion for Summary Judgment of Plaintiff's claim based on 15 USC S 1 be and it is hereby in all things granted.

VII.

Defendants have filed a second motion for judgment, contending that Plaintiff has no standing to sue the Defendants because Plaintiff was not a direct purchaser of steel from the Defendants. See *Illinois Brick Co. v. State of Illinois*, ...U.S....., 45 U.S.L.W. 4611 (June 7, 1977).

In response to Defendants' second motion for judgment, Plaintiff requests that the motion be denied, or in the alternative, that the Court re-open discovery on the issues involved in the second motion for judgment.

Inasmuch as the Court has determined that Plaintiff's cause of action is barred by the statute of limitations, the Court need not rule on the alternative ground stated in Defendants' second motion for judgment.

VIII.

Plaintiff's Complaint for alleged violations of Tex. Rev. Civ. Stat. Ann. Art. 2368(a) is brought pursuant to the pendant juris-

diction of this Court. It appearing to the Court that pendant jurisdiction is a doctrine of discretion, and that if Federal claims are dismissed before trial, State claims which are alleged should be dismissed as well, *United Mine Workers v. Gibbs*, 388 U.S. 715 (1966).

IT IS ORDERED that Plaintiff's cause of action based on Tex. Rev. Civ. Stat. Ann., Art. 2368(a) be dismissed without prejudice to filing that claim in the State court.

Sepember 6, 1977

WILLIAM S. SESSIONS

United States District Judge

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

TEL 504—589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

August 18, 1978

TO ALL PARTIES LISTED BELOW:

No. 77-3233 — THE CITY OF EL PASO v. DARBYSHIRE STEEL CO., INC., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing*, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By BRENDA M. HAUCK
Deputy Clerk

*on behalf of appellant, City of El Paso

bmh

cc: Mr. Larry Baskind
Mr. George R. Poehner
Mr. Richard Munzinger
Mr. W. C. Peticolas
Mr. Jack Ratliff

Supreme Court, U. S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-811

THE CITY OF EL PASO,

Petitioner,

versus

DARBYSHIRE STEEL COMPANY, INC., EL PASO MACHINE & STEEL WORKS, INC., and ROBBERSON STEEL, INC.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents pray that the Court refuse Writ of Certiorari in this case.

QUESTION PRESENTED

Whether the Fifth Circuit properly held that *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) controlled the result in this case.

STATEMENT OF THE CASE

The significant facts are properly stated in the opinions of the courts below. The key dates are:

> August 10, 1970 — The date the City signed its contract with McKee (general contractor) for the construction of El Paso's Civic Center Complex;
>
> September 4, 1970 — The date McKee signed the structural steel subcontract purchasing the steel from Respondents; and
>
> August 19, 1975 — Four years, eleven months later when the City filed its suit.

The case is before this Court on a question of antitrust limitations. Respondents emphasize that the evidence establishes that there was no conspiracy — Respondents openly formed a joint venture to submit one bid for work which no one of them could perform alone, a practice lawful under the *Penn-Olin* rule*. In order that a combined bid could be submitted, each venturer agreed to prepare a part of the bid and to perform its agreed part of the work. Petitioner's description of the Respondents' activities at page 5 of its Brief fails to note that the agreements and conduct it seeks to condemn are inherent in a joint venture arrangement. The efficiencies achieved by the internal agreement are reflected in Respondents' bid which was some $51,000.00 lower than the next competing bid.

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* *U.S. v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

ARGUMENT

Based on the faulty premise that *Zenith* does not apply to continuing conspiracy cases (and that this case is a continuing conspiracy case), Petitioner argues that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and not *Zenith*, governs and that the Fifth Circuit erred in applying *Zenith* resulting in a conflict with the opinions of other circuits.

Even if Petitioner's claim that this is a continuing conspiracy case were correct (which is denied), the argument is without merit. This Court held *Zenith* applicable to continuing conspiracy cases:

> *"In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case,* this [the rule on accrual of causes of action] has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." (Emphasis added.) 401 U.S. at 338.

The Fifth Circuit properly applied *Zenith* in holding that Petitioner was required to file its suit for damages within four years of the date they were incurred. In *Zenith*, this Court said:

> "Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action. On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." 401 U.S. at 339.

When, therefore, the plaintiff's damages can be proved with that degree of certainty required by law, the statute begins running as to those damages. If damages are not then provable with the required certainty, the statute does not begin to run until they become provable.

Since *Zenith* applies to continuing conspiracies and was decided after *Hanover Shoe*, it controls the result in any event. Claims of conflict between Circuit Courts are immaterial. The question is simply whether the Fifth Circuit has properly applied the applicable Supreme Court holding which must be *Zenith*.

In this case, by September 4, 1970 the alleged conspiracy had been formed and had, under Petitioner's allegations, succeeded in its sinister purpose — the elimination of bidding competition resulting in a steel subcontract at an allegedly inflated price. By September 4, 1970, then, the City had felt the adverse impact of the alleged conspiracy in that the market for the subcontract had been foreclosed and the alleged artificially high price set and agreed to. The City has admitted that immediately following the bidding, and prior to contract, it performed its own studies of the reasonableness of the structural steel price. The City's damages would have been measured by the difference between a truly competitive price and the allegedly fixed price. As the Fifth Circuit held, such damages were as capable of ascertainment and proof in 1970 as in 1975. Thus, almost five years prior to filing its suit, Petitioner could have proved the elements of its antitrust case including the amount of its alleged damages.

The Fifth Circuit's decision should also be affirmed under the holding of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Petitioner did not purchase the steel directly from Respondents. Petitioner purchased the structural steel (in the form of the completed Civic Center) from McKee who in turn had purchased it from Respondents. Since Petitioner was an indirect purchaser only, under *Illinois Brick* it lacks standing to bring this suit and for that reason the Fifth Circuit's judgment should be affirmed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this ____ day of December, 1978, three true and correct copies of Respondents' Brief have been forwarded to Mr. George R. Poehner, Coke & Coke, 3600 First National Bank Building, Dallas, Texas 75202; Mr. Tom Diamond, Diamond, Rash, Leslie & Smith, 1208 Southwest Bank Building, El Paso, Texas 79901, Attorneys of Record for The City of El Paso, Petitioner; and to Mr. John C. Ross, Jr., City Attorney, The City of El Paso, City-County Building, El Paso, Texas 79901.

OF COUNSEL